Supreme Court, U. S.
FILED
JUN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1868

IN RE: GRAND JURY INVESTIGATION

Carl Max Janavitz, Esquire
and Burton Sandler, Esquire
Appellants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	11
Appendix A Opinion and Order of the United States District Court for the Western District of Pennsylvania per Teitelbaum, J. dated June 28, 1977 at Miscellaneous No. 6798	1a
Appendix B Order of the United States Court of Appeals for the Third Circuit dated March 9, 1978 at Nos. 77-1916 and 77-2054	15a
Appendix C Per Curiam Opinion of the United States Court of Appeals for the Third Circuit	17a

TABLE OF CITATIONS

CASES

In Re: Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976)	7
In Re: Grand Jury Subpoena (Taylor), 22 Crim. L. Reporter 2327 (2d Cir. 1977)	8
In Re: Investigation before the April, 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976)	7
In Re: Investigation before the February, 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977)	8, 9
In Re: Matter of Seymour A. Gopman, 531 F.2d 262 (5th Cir. 1976)	9

Table of Citations.

UNITED STATES CONSTITUTION

First Amendment 3, 7
Sixth Amendment 3, 7

UNITED STATES STATUTES

18 U.S.C. § 6002 5
18 U.S.C. § 6003 5
28 U.S.C. § 1254(1) 2

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AND NOW COME the Appellants above named, your Petitioners herein, by their counsel Robert McClenahan, Esquire, and Carl Max Janavitz, Esquire, and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled matter on June 2, 1978.

CITATIONS TO OPINIONS BELOW

An Appeal was taken from the Order of the Federal District Court for the Western District of Pennsylvania per Teitelbaum, J. dated June 28, 1977 at Miscellaneous No. 6798, to the United States Court of Appeals for the Third Circuit, a copy of which is reprinted in Appendix A hereto, *infra*. By Order dated March 9, 1978, the United States Court of Appeals for the Third Circuit ordered reargument and the filing of supplemental briefs. A copy of this has been reprinted in Appendix B hereto, *infra*. On June 2, 1978, the United States Court of Appeals for the Third Circuit filed a Per Curiam opinion which has been reprinted in Appendix C hereto, *infra*. The above opinions and order are as yet unreported.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 2, 1978. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT'S ORDER DISQUALIFYING APPELLANTS FROM REPRESENTING MRS. JOHNS WAS REPUGNANT TO THE FIRST AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT IT DENIED HER THE RIGHT TO FREEDOM OF ASSOCIATION AND TO SEEK THE ADVICE OF COUNSEL OF HER CHOICE.

STATUTES INVOLVED

This case involves the First and Sixth Amendments to the Constitution of the United States and Sections 6002 and 6003 of Title 18, United States Code.

STATEMENT OF THE CASE

On or about May 25th, 1977, the United States Attorney for the Western District of Pennsylvania, by Henry G. Barr, Esq., caused to be filed in the District Court for the Western District of Pennsylvania a motion for the disqualification of Burton Sandler, Esq., and Carl Max Janavitz, Esq.. Said motion and its subsequent amendment sought the disqualification of Attorneys Sandler and Janavitz from the representation of eleven witnesses subpoenaed to appear before a Federal Grand Jury sitting in Pittsburgh. A hearing on the motion was held on June 20th and 21st, 1977, before Judge Teitelbaum. Subsequent to the hearing, Attorneys Sandler and Janavitz filed a motion to withdraw from the representation of four of the subpoenaed witnesses.

On June 28th, 1977, the lower court ordered that the Government's motion for disqualification be denied as to Witnesses Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone, and Jerry Barnhouse. Attorneys' Sandler and Janavitz motion for withdrawal from representation of Witnesses Richard N. Thompson, Ben Nabors, Kelsie Lanning, and James Johns was granted, thereby rendering moot as to those witnesses the United States Attorney's motion for disqualification.

The motion for disqualification of Attorneys Sandler and Janavitz was granted, however, with respect to the Witness Phyllis Johns. Attorneys Sandler and Janavitz then took a timely appeal from the order of the lower court, disqualifying them from the representation of Phyllis Johns before the Federal Grand Jury sitting at Pittsburgh in the United States Court of Appeals for the Third Circuit. The cause was originally

argued on February 23rd, 1978, before Aldisert, Van Dusen, and Weis, Circuit Justices. By order of the Court of Appeals for the Third Circuit, dated March 9th, 1978, the matter was re-argued on May 11th, 1978, before the Court *en banc*. In a *per curiam* opinion filed June 2nd, 1978, the Court *en banc* evenly divided on the merits of the appeal and accordingly this writ is sought.

The relevant facts of this case may be briefly summarized as follows:

On February 16th, 1977, a search warrant was executed for a warehouse in Pittsburgh, Pennsylvania, occupied by the Majestic News Company. This search resulted in the seizure of a large quantity of allegedly pornographic material. Subsequent to the search, a Federal Grand Jury in Pittsburgh began investigating possible violations of federal law relative to the transportation of these materials. At various times subsequent to the search, the following ten witnesses, represented jointly by Attorneys Sandler and Janavitz, were subpoenaed to appear before the Grand Jury in Pittsburgh: Gregory Kocan, Phyllis Johns, Richard Jenkins, John Halas, Glen Gossard, James Johns, Richard Thompson, James Calderone, Jerry Barnhouse and Kelsie Lanning. Additionally, Ben Nabors, represented exclusively by Mr. Janavitz, was called before the Grand Jury.

Some of the above witnesses were employees or former employees of the Majestic News Company. Gregory Kocan, manager of the Majestic News warehouse, was identified for the first time by the government in its motion for disqualification as a "target" of the investigation.

On April 28th, 1977, Phyllis Johns was granted statutory-use immunity pursuant to 18 U.S.C., Sections 6002, and 6003, by order of Federal District Judge

Rosenburg, and directed to answer questions before the Grand Jury pursuant to the order.

At the June 20th and 21st, 1977 hearing on the government's motion, the government made a formal offer of nonprosection to Witnesses Phyllis Johns, Richard Thompson, Ben Nabors, Kelsie Lanning, and James Johns. Following this hearing, Attorneys Sandler and Janavitz filed with the Court a motion for withdrawal of appearance as to four of these witnesses, but not as to Phyllis Johns. This motion was granted by the lower court. (Teitelbaum opinion at Page 3 of Appendix A.)

The testimony of Attorney Sandler revealed that he met with these witnesses in a group and informed them that a possibility of conflict of interest existed. Since no immunity offers appeared to be forthcoming, he instructed them that no such conflict *then* existed. If one were to arise, however, he informed them he would withdraw his appearance. (Hearing transcript Pages 347-348.)

The testimony of Attorney Janavitz at the hearing revealed that he was billing each witness individually for his attorney's fee, and would look to each witness individually for the payment of the fee. (Hearing transcript Pages 120-122.)

At the hearing of June 20th and 21st, 1977, Judge Teitelbaum pointedly warned and cautioned each witness represented by Attorneys Sandler and Janavitz of the potential conflict of interest to which their multiple representation could give rise. After Judge Teitelbaum's warning, each witness, including Phyllis Johns, indicated to the Judge that they desired to maintain Attorneys Sandler and Janavitz as their counsel before the Grand Jury. (Teitelbaum opinion, Page 3, Appendix A.)

REASONS FOR GRANTING THE WRIT

In recent times, the question of multiple representation of witnesses appearing before Federal Grand Juries has plagued the United States Court of Appeals. Serious First and Sixth Amendment problems arise. Decisions have been rendered in the Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, and the Circuit for the District of Columbia. A brief summary of their differential resolution of this problem follows:

1. In a separate Third Circuit case, *In Re Grand Jury Empaneled January 21, 1975,* 536 F.2d 1009 (3d Cir. 1976) an attorney represented nine witnesses subpoenaed before a grand jury. The attorney had advised the nine that there was a potential conflict of interest and that he would withdraw if an actual conflict developed. All nine individuals waived conflict-free counsel before the District Court and all paid the attorney individually. After all witnesses had invoked their Fifth Amendment privilege, the government moved to disqualify the attorney from representing more than one witness on the ground that the effectiveness of the grand jury investigation was impeded. The government further submitted that the multiple representation could interfere with an offer of immunity to one of the witnesses. The District Court, after a hearing, disqualified the attorney. The Court of Appeals reversed and held that there was an insufficient evidentiary basis for disqualifying the attorney inasmuch as the government had never offered to negotiate immunity with any of the witnesses and that the attorney had represented that he would withdraw from representing any witness to whom the government did offer immunity.

2. In *In Re: Investigation before the April, 1975 Grand Jury,* 531 F.2d 600 (D.C. Cir. 1976), the District of Columbia Circuit was asked to decide whether a single attorney could represent twenty-one witnesses before a grand jury investigating property damage to a newspaper publisher during a strike by the press workers union. The government moved for separate counsel after nineteen of the witnesses had allegedly improperly invoked their Fifth Amendment privilege. The District Court sustained the motion. The Court of Appeals held that the government had acted prematurely in its disqualification motion and that it rather should have brought the individual witnesses before the District Court to determine at a hearing whether the Fifth Amendment privilege had been properly asserted so that the exact relationship between the witnesses and the attorney could be considered.

3. The Second Circuit, in *In Re: Grand Jury Subpoena (Taylor),* 567 F.2d 1183 (2d Cir. 1977), also found that a District Court had acted prematurely when it prohibited a grand jury witness from retaining an attorney who already represented three other witnesses who were targets of the grand jury investigation. The government had alleged in its motion that such representation was a conflict of interest and that it impeded the grand jury investigation. The Second Circuit reversed and stated that the government should have continued the usual course of its investigation by calling the witness to testify. If the witness invoked the protection of the Fifth Amendment, the government could have offered him immunity. If the witness still chose to remain silent and face contempt and he knowingly and intelligently wished to continue with the same counsel, the Court then would have had to accept this position.

4. The circumstances in *In Re: Investigation before the February, 1977 Lynchburg Grand Jury,* 563 F.2d, 652, (4th Cir. 1977) prompted the Fourth Circuit to find a different result. In that case the single attorney who represented nine witnesses before the Grand Jury was himself a target of the investigation. All witnesses had asserted their Fifth Amendment privilege, but three, when questioned by the District Court, testified that they had invoked the privilege to protect not themselves but their attorney. The District Court sustained a motion by the government to disqualify the attorney. The Court of Appeals for the Fourth Circuit affirmed.

5. A case in the Fifth Circuit, *In Re: Matter of Seymour A. Gopman,* 531 F.2d, 262 (5th Cir. 1976), had a fact situation in which the grand jury was conducting an investigation of possible violations of the Landrum-Griffin Act by union officials in Miami, Florida. More specifically, the grand jury was considering evidence of alleged embezzlement by union officials, failure to maintain required records and the destruction of records by union officials. A single attorney represented both the union and three officials who had been subpoenaed as witnesses and who had asserted their Fifth Amendment privilege. The Landrum-Griffin Act, of course, is designed to protect union members from corruption by their officers. The government alleged a conflict of interest and moved for disqualification of the attorney. The District Court agreed. The Court of Appeals affirmed the ruling of the lower court and held that because of the particular circumstances and because of the purpose of the Landrum-Griffin Act the District Court was within its discretion to find a conflict of interest and to disqualify the attorney.

It is significant to note the dissent of Judge Clark in this case. He stressed that any conflict that the Court may have found was, under the present facts, potential and not actual and that the disqualification order was therefore premature.

A review of these cases can only lead the practicing attorney to a hopeless impasse in arriving at a decision as to whether to undertake the multiple representation of witnesses appearing before a Federal Grand Jury when such multiple representation may well be to the best interest of all of those witnesses.

CONCLUSION

The issue presented by this petition is obviously of great importance to the petitioners, but its importance is far greater than that to the national legal community. The right of all persons to freedom of association and counsel of their choice remains of paramount importance. Where the various Circuits are in disagreement and further, where the entire Court for the Third Circuit of the United States Court of Appeals is equally divided, it would appear that the time is ripe for a definitive statement by the Supreme Court of the United States.

WHEREFORE, petitioners respectfully request that this Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY INVESTIGATION
(Miscellaneous No. 6798)

Opinion

FACTS

The matter presently before this Court involves an investigation being undertaken by grand juries convened within the Western District of Pennsylvania. This investigation concerns possible violations of Title 18, United States Code, Sections 371, 1462, 1465 and 2, relating to the interstate distribution of pornographic and obscene materials.

On February 16, 1977, a search was conducted of premises occupied by the Majestic News Company located at 922 West North Avenue. As a result of this search, a large volume of records maintained by the Majestic News Company were seized, as well as approximately 2,000 allegedly pornographic 8 millimeter or super 8 millimeter films. During the course of the search, several employees of the Majestic News Company were observed on the premises.

Subsequent to this search, a number of persons employed by the Majestic News Company were subpoenaed to appear before a Federal Grand Jury on April 14, 1977. These individuals were Gregory Kocan,[1] Phyllis Johns, Richard Jenkins, John Halas, Glenn Gossard and James Johns. During their appearance before the Grand Jury, each of the above witnesses were represented by Burton Sandler, Esquire and Carl M. Janavitz, Esquire. Thereafter, Richard Thompson and James Calderone, addi-

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1. Mr. Kocan is the manager of the Majestic News Company.

tional employees of the Majestic News Company, and Ben Nabors, an employee of a book store located in Wheeling, West Virginia, were brought before the Grand Jury. Thompson, Calderone and Nabors were all represented by Mr. Janavitz and Thompson and Calderone were additionally represented by Mr. Sandler.[2] In total, Mr. Sandler represented ten clients while Mr. Janavitz represented eleven clients.

On April 28, 1977, Phyllis Johns was scheduled to appear before the Grand Jury in order to answer questions under a grant of statutory use immunity.[3] After each individual question, Mrs. Johns left the Grand Jury room whereupon Mr. Janavitz would tape record each question.[4] During some of the periods that Mrs. Johns left the Grand Jury room to record each question, Mr. Gregory Kocan, a "target" of the investigation, was observed to be standing close by.[5] The obvious purpose of recording each question addressed to Mrs. Johns was to better enable Mr. Janavitz and Mr. Sandler to represent their respective clients.

Believing that the multiple representation by Mr. Sandler and Mr. Janavitz of the various witnesses that have appeared before the Grand Jury constituted a con-

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2. Mr. Janavitz and Mr. Sandler also jointly represented Jerry Barnhouse and Kelsie Lanning.

3. 18 U.S.C. §§6002-6003.

4. The tape recording was not clandestine and at a hearing on this matter before this Court, Mr. Janavitz explicitly admitted that he was tape recording each and every question, Tr. p. 115.

5. It is Mr. Janavitz's testimony that Mr. Kocan could not overhear anything said and that Mr. Kocan has not had the tape recording made available to him nor has a transcript of the tape recording been made available to him, Tr. p. 116.

flict of interest which was impeding the effectiveness of the Grand Jury's investigation, the Government filed a motion requesting that both Mr. Janavitz and Mr. Sandler be disqualified from representing all of their clients.[6]

A hearing on the above motion was held before this Court on June 20, and 21, 1977. At this hearing each of Mr. Sandler's and Mr. Janavitz's clients were instructed by this Court that the multiple representation involved might result in a conflict of interest on the part of counsel and might be disadvantageous to the client's right to unfettered representation. Each client responded that they still desired to be represented by Mr. Janavitz and/or Mr. Sandler.

During the course of the hearing, a formal offer of non-prosecution was made by the government to Phyllis Johns,[7] Richard Thompson, Ben Nabors, Kelsie Lanning and James Johns.[8] Subsequently, Mr. Janavitz and/or Mr. Sandler filed a motion for withdrawal of representation of Grand Jury witnesses Richard Thompson, Ben Nabors, Kelsie Lanning and James Johns. Said motion was granted by Order of this Court on June 28, 1977.[9]

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6. The original motion only names nine (9) clients, but by subsequent amendment Jerry Barnhouse and Kelsie Lanning were also included.

7. Phyllis Johns had previously been granted statutory use immunity.

8. At the hearing there was some dispute as to whether formal offers of non-prosecution had been made previously. In light of the offers made at the hearing, a resolution of the proper label to be attached to past requests for cooperation by the government is unnecessary.

9. The government's brief artfully draws attention to the fact that all of the Grand Jury witnesses, except Phyllis Johns after her grant of statutory immunity,

ISSUES

The issue presented for our determination is whether or not Mr. Sandler and Mr. Janavitz should be disqualified from representing Grand Jury witnesses Phyllis Johns, Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse during the Grand Jury proceedings.[10] The resolution of this inquiry requires an accommodation between the right to counsel of one's own choosing and the individual's right to meaningful legal representation.

DISCUSSION

"Phyllis Johns"

The Sixth Amendment of the United States Constitution guarantees that every individual has the right to effective assistance of counsel. A penumbra of this Sixth Amendment right is the right to retain counsel of one's own choosing. The right to choose one's own counsel, however, is not absolute. *Cf. United States v. Garafola,* 428 F.Supp. 620, 626 (D. N.J. 1977). As stated in *Matter of Grand Jury Empaneled January 21 1975,* 536 F.2d 1009, 1012 (3d. Cir. 1976): "THE GOVERNMENT MAY OBTAIN, IN APPROPRIATE CIRCUMSTANCES, JUDICIAL INTERFERENCE WITH PRIVATE ARRANGEMENTS FOR MULTIPLE LEGAL REPRESENTATION OF WITNESSES CALLED TO TESTIFY BEFORE A GRAND JURY . . . ."

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exercised their Fifth Amendment privilege during Grand Jury proceedings. The apparent thrust of this citation is to coach an inference that the Fifth Amendment was being used as a tool to obstruct the Grand Jury investigation. To the extent that the Fifth Amendment always erects a barrier to information gathering, such an inference would be unwarranted. However, if the government felt that the Fifth Amendment was being frivolously asserted, there were remedies available at that point in time of which the government did not avail itself. *In Re Investigation Before April 1975 Grand Jury,* 531 F.2d 600, 608 (D.C. Cir. 1976); *Hoffman v. United States,* 341 U.S. 479, 488 (1951).

10. The question of representation relative to witnesses Thompson, Nabors, Lanning and James Johns is now mooted by virtue of counsel's withdrawal of June 28, 1977.

Recognizing that the right to choose one's counsel is not absolute, the issue arises whether there is a conflict of interest in Mr. Janavitz's and Mr. Sandler's (hereinafter "respondents") representation of Phyllis Johns.

Phyllis Johns has been cloaked with statutory use immunity. In addition, Mrs. Johns has an offer of non-prosecution by the government outstanding. Respondents are legal counsel for Mrs. Johns. Mrs. Johns' testimony given pursuant to immunity could be detrimental to others being investigated by the Grand Jury such as Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse. The above-named individuals are also represented by respondents.

The conflict created by this dual representation is both direct and immediate. The conflict is certainly direct in that respondents represent a person who is operating under a grant of statutory use immunity as well as people who are prospective defendants. The conflict is also immediate because Mrs. Johns has a formal offer of non-prosecution by the government. It requires but a statement of the obvious to realize that negotiations for a promise of non-prosecution cannot properly be conducted by attorneys who also represent those people who may well be hurt by testimony resulting from such

a promise.[11] There can be no better example of the ancient axiom that *"no man can serve two masters."*

Having concluded that there is both a direct and immediate conflict of interest in respondents' representation of Phyllis Johns, the issues arise as to whether Mrs. Johns can waive such a conflict of interest, and if she can, whether or not she properly did so.

As a general principle, an individual may waive the right to conflict-free assistance of counsel. *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975). The waiver, however, must be an *"intentional relinquishment or abandonment of a known right." Johnson v. Zerbst,* 304 U.S. 458 (1938). Not only must the waiver be a relinquishment of a known right but also must be done with *"awareness of the relevant circumstances and likely consequences." Brady v. United States,* 397 U.S. 742, 748 (1970).

At the hearing before this Court on June 21, 1977, Phyllis Johns was asked whether she voluntarily agreed to continue respondents' representation even though a possibility of conflict existed. Mrs. Johns answered yes.[12] It is this Court's opinion that Mrs. Johns did not waive her right to effective assistance of counsel at the hearing because of an inability to satisfy the standards of *Johnson* and *Brady.*

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11. Our holding in this case is that whenever any type of immunity is offered by the government to Grand Jury witnesses, advice relating to such immunity should be forthcoming from an attorney who does not represent any people who could be hurt by such testimony. This Court understands that there are certain features to a promise of non-prosecution, such as enforceability, which might well cause a witness to hold out for statutory use immunity even though such use immunity provides a thinner veil of protection.

12. Transcript, p. 178.

The problem of eliciting a valid waiver from Mrs. Johns largely stems from the fact that her immediate employer, Gregory Kocan, is a prospective defendant. Merely informing Mrs. Johns of the existence of a potential conflict and seeking a waiver from her does not adequately deal with the problem of multiple representation in this situation. *Mrs. Johns' "waiver"* is likely *a function in large part of one's natural hesitancy to alienate their employer rather than a product of a free and unrestrained will.*

Additionally, respondents themselves had made their clients aware of a potential for conflicts of interest while advising them that such a conflict did not yet exist. Mr. Sandler testified at the hearing:

> "I explained to them, as Your Honor has told them here in Court today, of the possibilities of conflict between representing multiple defendants. I indicated to them that in my opinion, at this point, since there was no offer of immunity, since they were all potential defendants, that I did not feel that I could not fairly represent them, but if I reached a point where I felt that I could not give them one hundred percent loyalty and devotion, I would step out of the picture."[13]

A waiver under these circumstances would be purely illusory. As stated in *Garafola, supra* at 624 under a similar factual setting:

> "He has already told his clients that there is no conflict in their interests. Thus, when the defendants answer the Court's inquiry, they actually are relying upon the advice received from their lawyer. If

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13. Transcript, p. 347-348.

he tells them there is no conflict and that he can effectively represent them, how can their responses to the court be deemed to amount to a *Johnson v. Zerbst* waiver of their sixth amendment right to effective aid of counsel?"

While one court has held that representation of both employer and employee in this type of situation is inherently improper, *In Re Abrams,* 266 A.2d 275 (1970), this Court will not adopt such a wide-ranging view. Today's decision is limited by the facts *sub judice.* Under these facts, Mrs. Johns was incapable of making a waiver which complies with *Johnson* and *Brady.*

This Court finds that a serious conflict of interest exists in Respondents' representation of Phyllis Johns and that such conflict could not have been properly waived by Mrs. Johns. Accordingly, respondents are disqualified from further representing Mrs. Johns before the Grand Jury.[14]

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14. The government strenuously urged that respondents be disqualified because their multiple representation impeded the effectiveness of the Grand Jury's investigation. However, discomfort to the Grand Jury process, without more, is not sufficient to vitiate an individual's important right to counsel of his own choosing. The government concedes that Phyllis Johns had the right to tell anyone about what transpired in the Grand Jury room. Tr. p. 381. Additionally, even if all of the witnesses retained separate counsel, the same result would easily accrue via a conference involving each individual counsel. An attorney would be derelict in his duty of representation if he did not try to impede the Grand Jury investigation through lawful means. The fact that the Grand Jury's job is made more difficult in the face of multiple representation does not justify judicial intervention in and of itself. (See *Matter of Grand Jury Empaneled January 21, 1975, supra,* where the Court held that the fact that each of nine witnesses whom an attorney was representing invoked the Fifth Amendment was an insufficient basis for disqualifying the attorney on the theory that such multiple representation impeded the effectiveness of the Grand Jury investigation.)

We are mindful of the Pennsylvania Supreme Court decision in *Pirillo v. Takiff,* 341 A.2d 896 (Pa. 1975), which held multiple representation a sufficient impediment to the Grand Jury process to justify disqualification. However, in *Pirillo,* the attorneys' fees were to be paid by a common source of funds—the Fraternal Order of Police. In the case *sub judice,* although the government has raised doubt as to payment of legal fees by each individual witness, it has not sustained its burden of proof on such issue.

"Other Witnesses"

A separate analysis is mandated when considering the government's motion for disqualification relative to witnesses Kocan, Jenkins, Halas, Gossard, Calderone and Barnhouse. None of these witnesses have been granted statutory use immunity nor do they presently have a formal offer of non-prosecution outstanding.

In *Matter of Grand Jury Empaneled January 21, 1975, supra,* the Third Circuit Court of Appeals, speaking through Judge Aldisert, established guidelines for the determination of the point in time when a *potential* conflict of interest is transformed into an *actual* conflict of interest. That point in time was held to be whenever the government communicates to the attorney that it desires to offer immunity to any of his clients. Judge Aldisert stated:

"Attorney Koelzer has represented throughout that he would withdraw as soon as a conflict arose; at oral argument, he reaffirmed this pledge and stated

specifically that he would withdraw from representing any witness whom the government approached to discuss immunity or a plea. Thus, confronted with hypotheticals and not evidence, with rhetoric and not fact, the district court erred in stripping appellants of the counsel of their choice.[15]

The D.C. Circuit espoused a similar view in *In Re Investigation Before April 1975 Grand Jury,* 531 F.2d 600 (D.C. Cir. 1976). The issue thus arises whether or not an actual conflict exists so as to make the motion for disqualification ripe for determination as it relates to the aforementioned other witnesses.

Respondents have indicated an intention to withdraw from representation if an actual conflict of interest arises such as through an offer of immunity or non-prosecution.[16] Upon the government's formal offer of non-prosecution at the hearing before this Court, respondents honored their represented intentions and withdrew as counsel for witnesses Thompson, Nabors, Lanning, and James Johns. These circumstances fall clearly within the proscriptions enunciated by the Court of Appeals for the Third Circuit. Absent some indication that the government is seeking to obtain statutory immunity for these other witnesses or willing to grant a formal promise of non-prosecution, the motion for disqualification as to these particular witnesses is not ripe for judicial intervention. The *sine qua non* of the government's motion—an actual conflict of interest—lacking.[17]

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15. *Matter of Grand Jury Empaneled January 21, 1975, supra,* at 1012-13.

16. See p. 6.

17. The government reads the holding in *Matter of Grand Jury Epaneled January 21, 1975, supra,* to mean that the issue becomes ripe as to all witnesses whenever the government has made an offer of immunity to *any* witness Tr. p. 386. Such an interpretation would presumably allow judicial intervention because Phyllis Johns has both statutory immunity and a formal offer of non-prosecution. The government misconceives the thrust of the Third Circuit's opinion. Its purpose was to define the birth of an actual conflict of interest. That different witnesses may be in different positions vis a vis the government, even though represented by common counsel, is the heart of this proceeding. Thus, while respondents' continued representation of Phyllis Johns constituted a very real conflict of interest, there is no suggestion by Judge Aldisert that such conflict should taint those witnesses who have no immunity or promise of nonprosecution. The government's interpretation would result in an undesirable bootstrapping of Grand Jury witnesses whose common legal representation is not counterproductive to the Sixth Amendment guarantee of effective legal assistance. It would also open the door to disqualification of counsel whose advice to his clients the government does not like.

Accordingly, the government's motion for disqualification must be denied insofar as it relates to Grand Jury witnesses Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse.

CONCLUSION

The Constitutional limitation of Article 3, Section 1 *et seq.* precludes the rendering of advisory opinions. Accordingly, the decision-making power of this Court is circumscribed by the facts *sub judice.* Thus, today's opinion only passes on the right of respondents to represent these Grand Jury witnesses for the purpose of Grand Jury proceedings. No opinion is hereby expressed as to multiple representation at trial should any of the witnesses be indicted.

specifically that he would withdraw from representing any witness whom the government approached to discuss immunity or a plea. Thus, confronted with hypotheticals and not evidence, with rhetoric and not fact, the district court erred in stripping appellants of the counsel of their choice.[15]

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15. *Matter of Grand Jury Empaneled January 21, 1975, supra,* at 1012-13.

16. See p. 6.

17. The government reads the holding in *Matter of Grand Jury Epaneled January 21, 1975, supra,* to mean that the issue becomes ripe as to all witnesses whenever the government has made an offer of immunity to *any* witness Tr. p. 386. Such an interpretation would presumably allow judicial intervention because Phyllis Johns has both statutory immunity and a formal offer of non-prosecution. The government misconceives the thrust of the Third Circuit's opinion. Its purpose was to define the birth of an actual conflict of interest. That different witnesses may be in different positions vis a vis the government, even though represented by common counsel, is the heart of this proceeding. Thus, while respondents' continued representation of Phyllis Johns constituted a very real conflict of interest, there is no suggestion by Judge Aldisert that such conflict should taint those witnesses who have no immunity or promise of nonprosecution. The government's interpretation would result in an undesirable bootstrapping of Grand Jury witnesses whose common legal representation is not counterproductive to the Sixth Amendment guarantee of effective legal assistance. It would also open the door to disqualification of counsel whose advice to his clients the government does not like.

Accordingly, the government's motion for disqualification must be denied insofar as it relates to Grand Jury witnesses Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse.

CONCLUSION

The Constitutional limitation of Article 3, Section 1 *et seq.* precludes the rendering of advisory opinions. Accordingly, the decision-making power of this Court is circumscribed by the facts *sub judice*. Thus, today's opinion only passes on the right of respondents to represent these Grand Jury witnesses for the purpose of Grand Jury proceedings. No opinion is hereby expressed as to multiple representation at trial should any of the witnesses be indicted.

In summary, we hold that the government's motion for disqualification be denied insofar as it relates to respondents' representation before the Grand Jury of witnesses Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse. We further hold that respondents are disqualified from representing witness Phyllis Johns before the Grand Jury. An appropriate Order was entered on June 28, 1977.[18]

Hubert I. Teitelbaum
United States District Judge

Dated: August 23, 1977

copies to:

Henry G. Barr, Ass't U.S. Attorney

Burton W. Sandler, Esquire
28 Allegheny Avenue
The Penthouse, Suite 600
Towson, Maryland 21204

Carl Max Janavitz, Esquire
719 Frick Building
Pittsburgh, PA 15219

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18. This Court, as an incident to its supervisory power over the Grand Jury also has the power to discipline an attorney whose unethical conduct relates to Grand Jury proceedings. *In Re Gopman,* 531 F.2d 262 (5th Cir. 1976). The existence of such power, however, does not automatically necessitate its exercise. Action by the Pennsylvania Disciplinary Board is the more appropriate procedure should discipline be warranted. Accordingly, we express no opinion as to the ethical propriety of respondents' multiple representation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY INVESTIGATION.
(Misc. No. 6798)

Order

AND NOW, to-wit, this 28th day of June, 1977, upon consideration of the government's motion to disqualify respondents Burton Sandler, Esquire, and Carl Max Janavitz, Esquire, from representing certain witnesses before the Grand Jury in the above-capitioned matter, and after a full hearing and argument thereon, IT IS ORDERED that said motion be and the same is hereby granted insofar as it relates to the witness Phyllis Johns, and respondents are hereby disqualified from further representing Ms. Johns before the Grand Jury.

IT IS FURTHER ORDERED that the government's motion for disqualification be and the same is hereby denied insofar as it relates to respondents' representation before the Grand Jury of witnesses Gregory Kocan, Richard Jenkins, John Halas, Glen Gossard, James Calderone and Jerry Barnhouse.

Upon consideration of a pleading styled "praecipe for withdrawal of appearance" filed by respondents in the above matter, and treating the same as a motion for withdrawal of representation of Grand Jury witnesses Richard N. Thompson, Ben Nabors, Kelsie Lanning and James Johns. IT IS FURTHER ORDERED that respondent's motion for withdrawal be and the same is hereby granted, and that the government's motion be and the same is hereby denied as moot insofar as it seeks to disqualify

respondents from representing Messrs. Thompson, Nabors, Lanning and James Johns before the Grand Jury.

A memorandum of the Court's decision in this matter will be filed in due course.

Hubert I. Teitelbaum
United States District Judge

copies to:

Henry G. Barr, Ass't. U.S. Attorney
Burton Sandler, Esquire
Carl Max Janavitz, Esquire

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1916 and 77-2054

IN RE: GRAND JURY INVESTIGATION

Burton Sandler
Carl Max Janavitz
Carl Max Janavitz, Esquire and
Burton Sandler, Esquire,
Appellants in No. 77-1916
United States of America,
Appellant in No. 77-2054

(D. C. Misc. No. 6798)

The Court by order having directed rehearing en banc in the above-entitled cases,

It is ORDERED that the parties may, if they so desire, file supplemental briefs herein which may be in legible, photostatic form, original and twenty-four (24) copies, and must be hand-filed and hand-served as follows:

1. Counsel of Janavitz and Sandler are to file their supplemental brief, if any, not later than March 20, 1978;
2. Counsel for United States of America is to file its supplemental brief, if any, not later than March 30, 1978.

If the parties file such supplemental briefs, they are requested to address themselves in particular to the relevance of *United States v. Dolan* (3d Cir., Jan. 23, 1978) to the matters herein;

It is FURTHER ORDERED that the Criminal Law Section of the American Bar Association, the Delaware State Bar Association, the New Jersey State Bar Association and the Pennsylvania State Bar Association are invited to file briefs amici curiae on the following question:

> Should the Court disqualify counsel for two or more witnesses before the Grand Jury on the basis of a potential conflict of interest?

Briefs may be in legible, photostatic form, original and twenty-four (24) copies, and should be filed not later than April 10, 1978.

For the Court,

Clerk

Dated: March 9, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1916
No. 77-2054

IN RE: GRAND JURY INVESTIGATION

Carl Max Janavitz, Esquire and
Burton Sandler, Esquire,
Appellants in No. 77-1916
United States of America,
Appellant in No. 77-2054

(Misc. No. 6798, W.D. of Pa.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 23, 1978
Before ALDISERT, VAN DUSEN and WEIS, *Circuit Judges*
Reargued in banc May 11, 1978
Before SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

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United States Attorney
Henry G. Barr, Assistant
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Robert L. Potter, Esquire
3900 Forbes Avenue
Pittsburgh, Penna. 15260
Amicus Curiae Counsel

Opinion of the Court

(Filed June 2, 1978)

PER CURIAM.

The first of these appeals (77-1916) is from a final order of the district court disqualifying attorneys Sandler and Janavitz from representing Phyllis Johns, a federal grand jury witness. The district court found a conflict of interest and determined that Phyllis Johns could not have properly waived it. The court is evenly divided on the merits of this appeal.

The second appeal (77-2054) is by the government from an order of the district court denying the government's motion to disqualify attorneys Sandler and Janavitz from representing some six other grand jury witnesses. The district court determined that the motion for disqualification was not ripe for judicial intervention under the circumstances of the case. The court by a majority vote determines that this appeal should be dismissed for want of an appealable order.

The order of the district court at No. 77-1916 will be affirmed. The appeal at No. 77-2054 will be dismissed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

No. 77-1868

Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

IN RE CARL MAX JANAVITZ and
BURTON SANDLER, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 4

Conclusion 12

CITATIONS

Cases:

Branzburg v. *Hayes*, 408 U.S. 665 6

Dent v. *West Virginia*, 129 U.S. 114 5

Eisenstadt v. *Baird*, 405 U.S. 438 5

Fisher v. *United States*, 425 U.S. 391 5

Gooding v. *Wilson*, 405 U.S. 518 5

Gopman, In re, 531 F. 2d 262 ..... 10, 11

Grand Jury, In re, 446 F. Supp. 1132 12

Grand Jury Empaneled January 21, 1975, In re, 536 F. 2d 1009 ..... 11, 12

Griswold v. *Connecticut*, 381 U.S. 479 5

Groban, In re, 352 U.S. 330 8

Holloway v. *Arkansas*, No. 76-5856 (Apr. 3, 1978) 10

Hull v. *Celanese Corp.*, 513 F. 2d 568 7

Investigation Before April 1975 Grand Jury, In re, 531 F. 2d 600 ..... 5, 11, 12

Page

Cases—continued:

Investigation Before February, 1977, Lynchburg Grand Jury, In re, 563 F. 2d 652 ..... 9, 11

Kirby v. *Illinois*, 406 U.S. 682 8

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 5

Ruffalo, In re, 390 U.S. 544 5

Special February 1977 Grand Jury, In re, No. 78-1520 (7th Cir. Aug. 11, 1978) 11, 12

Taylor, In re, 567 F. 2d 1183 ..... 5, 11, 12

Thornhill v. *Alabama*, 310 U.S. 88 5

Tileston v. *Ullman*, 318 U.S. 44 5

United States v. *Armedo-Sarmiento*, 524 F. 2d 591 7

United States v. *Calandra*, 414 U.S. 338 6

United States v. *Dionisio*, 410 U.S. 1 6

United States v. *Gaines*, 529 F. 2d 1038 7

United States v. *Garafola*, 428 F. Supp. 620 10

United States v. *Garcia*, 517 F. 2d 272 7

United States v. *Mandujano*, 425 U.S. 564 8

United States v. *Raines*, 362 U.S. 17 5

United States v. *Scully*, 225 F. 2d 113, cert. denied, 350 U.S. 897 8

Page

Constitution and statutes:

United States Constitution:

First Amendment 5

Fifth Amendment 4

Sixth Amendment 5

18 U.S.C. 371 2

18 U.S.C. 1462 2

18 U.S.C. 1465 2

Miscellaneous:

American Bar Association's Code of Professional Responsibility, Canon 5 7

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1868

IN RE CARL MAX JANAVITZ and
BURTON SANDLER, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the equally divided en banc court of appeals (Pet. App. 17a-19a) is reported at 576 F. 2d 1071. The opinion of the district court (Pet. App. 1a-14a) is reported at 436 F. Supp. 818.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1978. The petition for a writ of certiorari was filed on June 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in disqualifying petitioners, who are attorneys, from representing an immunized grand jury witness, when they also represented the target of and other witnesses in the grand jury investigation.

STATEMENT

Following a hearing in the United States District Court for the Western District of Pennsylvania, the district court granted the government's motion to disqualify petitioners from representing Phyllis Johns, a grand jury witness, but denied the government's motion to disqualify petitioners from representing several other witnesses subpoenaed before the grand jury (Pet. App. 1a-14a).[1] Both petitioners and the government appealed, and the court of appeals ordered the cases to be heard en banc (*id.* at 15a-16a). It then dismissed the government's appeal for want of an appealable order and affirmed the disqualification order by an equally divided court (*id.* at 17a-19a).

The evidence adduced at the hearing on the motion to disqualify showed that on February 16, 1977, FBI agents, acting pursuant to an investigation into possible violations of 18 U.S.C. 371, 1462 and 1465 (relating to the interstate distribution of obscene materials), executed a search warrant on the premises of the Majestic News Company in Pittsburgh, Pennsylvania, and seized a large quantity of allegedly pornographic films and other records of the company (Tr. 8). Thereafter, the grand jury subpoenaed Gregory Kocan, the manager of Majestic News and the main target of the grand jury's inquiry, Phyllis Johns, the company's secretary and bookkeeper, five other present or former employees of the company, and four of its business associates (Tr. 20-21, 51, 92). Kocan instructed Johns to recommend to the other witnesses that they retain petitioners as their attorneys

[1]The government sought to disqualify petitioners from representing 11 grand jury witnesses. Petitioners' voluntary withdrawal from representation of four of the witnesses rendered the motion moot as to those witnesses.

and to advise them that Majestic News would provide loans for attorney's fees (Tr. 175, 181, 253, 268). Johns so advised the witnesses who, along with herself and Kocan, then retained petitioners (Tr. 182-185, 196-198).[2]

Prior to the witnesses' appearance before the grand jury in April 1977, the Assistant United States Attorney conducting the investigation informed petitioner Sandler that some of his clients were not in the same legal position as others and that it would be in the best interest of those persons to consider cooperating with the government (Tr. 55). The government attorney also advised petitioners that he believed there was a conflict of interest caused by petitioners' representation of the 11 witnesses (Tr. 58-59, 84-85). Petitioners did not seek immunity for any of the witnesses in exchange for their cooperation (Tr. 340-341) and instead informed the government that all of the witnesses then scheduled to appear before the grand jury would, on advice of counsel, invoke their privilege against self-incrimination (Tr. 55). Also prior to the grand jury appearances, petitioner Sandler informed the witnesses at a group meeting arranged by Kocan that he did not perceive a conflict in his continued joint representation of them but that he would withdraw if a conflict did in fact develop (Tr. 202-203, 215-216, 347-348). Petitioner Sandler did not notify any of the witnesses of the statement by the Assistant United States Attorney that it might be in their best interests to cooperate with the government in return for immunity (Tr. 204-207).

[2]The witnesses testified that, although they paid petitioners' fees from their own funds and no specific promises of repayment had been made, they hoped that Majestic News would reimburse them for their legal expenses (Tr. 137, 174, 180-181, 218, 234, 253, 282, 297, 299-300, 307, 321, 329, 332). Ten of the witnesses were jointly represented by petitioners; witness Ben Nabors was represented by petitioner Janavitz alone (Tr. 79-80, 293).

Thereafter all the witnesses except Johns (who was granted immunity) asserted their Fifth Amendment privilege and refused to answer questions before the grand jury (Tr. 79). Johns testified briefly before the grand jury, but did so in a vague and evasive manner. She left the grand jury room after virtually every question to consult with petitioner Janavitz and, as Kocan stood within a few feet of them, to tape record each question and answer (Tr. 9, 62, 115-116, 194).

Following these grand jury appearances, the government moved to disqualify petitioners from representing all 11 witnesses. The Assistant United States Attorney did not discuss with petitioners the possibility of immunity for any witnesses other than Johns before filing the disqualification motion, because of the problems posed by petitioners' multiple representation and because of Johns' lack of cooperation even after having been given immunity (Tr. 87, 341-342). At the conclusion of the disqualification hearing, however, the government made formal offers of non-prosecution to Johns and four other witnesses (Tr. 360-364). Subsequently, but prior to the district court's ruling, petitioners withdrew from representing the four witnesses but persisted in their representation of Johns, Kocan and the other five witnesses (A. 29).[3] The court then disqualified petitioners from representing Johns (A. 11).

ARGUMENT

Petitioners argue that the district court's order disqualifying them from representing Phyllis Johns violated her right "to freedom of association and counsel

[3]"A". refers to the appendix filled in the court of appeals.

of [her] choice" (Pet. 11)[4] and that this Court should resolve an alleged conflict among the circuits on the propriety of joint representation of witnesses appearing before a federal grand jury (*id.* at 7-10).

We recognize that the issue of joint representation at the grand jury stage is a significant one, implicating important and, in some circumstances, competing considerations of legal ethics, the need for unimpeded grand jury proceedings, the right to counsel of one's choice, and the judiciary's supervisory power over an arm of the district court. We also agree that the courts of

[4]Although petitioners may have standing to contend that the disqualification order arbitrarily interfered with their right to engage in the practice of law (see, *e.g.*, *In re Ruffalo*, 390 U.S. 544 (1968); *Dent* v. *West Virginia*, 129 U.S. 114 (1889)), there is a substantial question whether petitioners have standing to assert that the order abridged their former client's alleged First and Sixth Amendment rights. But see *In re Investigation Before April 1975 Grand Jury*, 531 F. 2d 600, 606 n.10 (D.C. Cir. 1976). As a general rule litigants lack standing to assert the constitutional rights of other persons. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943). Although the Court has recognized several exceptions to this general proposition, this is not a case where requiring the third parties to assert their own rights would nullify the very rights asserted (compare *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)), nor is it a situation where the claimant's rights are so intertwined with the third parties' that assertion of the third parties' rights is necessary not only to prevent their dilution but also to allow the claimant adequately to protect his own rights (compare *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), with *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972)), nor must the criteria for standing be relaxed in this case to prevent an intolerable inhibition on the exercise of free speech (see *Thornhill* v. *Alabama*, 310 U.S. 88, 92-99 (1940); cf. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972)). Clearly, Johns could easily protect her own rights by appealing from the disqualification order, a procedure that has been followed in other cases. See *In re Taylor*, 567 F. 2d 1183 (2d Cir. 1977). Cf. *Fisher* v. *United States*, 425 U.S. 391, 396-401 (1976).

appeals in recent years have announced somewhat divergent views on the authority of district judges to disqualify counsel in grand jury proceedings because of a conflict of interest and that it may be necessary at some point for this Court to consider the matter in an appropriate case. This, however, is not such a case. The record clearly supported the district court's determination that petitioners could not be allowed to represent both Johns, who had been given use immunity and a promise of non-prosecution in return for her cooperation in the government's investigation, and Kocan, the main focus of the grand jury's inquiry. Moreover, no circuit has held that a judge with responsibility for supervising the conduct of a federal grand jury is powerless to order disqualification in this situation.

1. This Court has remarked time and again on the importance of the grand jury's investigative function and of the obligation of all citizens to give evidence before that body. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *United States* v. *Dionisio*, 410 U.S. 1, 16-18 (1973); *Branzburg* v. *Hayes*, 408 U.S. 665, 682, 688 (1972). It cannot be doubted that the public interest in full and effective grand jury proceedings is severely frustrated when a witness, such as Phyllis Johns, refuses to testify candidly even after receiving immunity. This interest cannot be satisfactorily vindicated simply by the remedy of contempt, for whatever the punishment imposed, the grand jury would still be deprived of the needed evidence and the judicial process would still be obstructed. In such circumstances, it is incumbent upon the trial judge to determine the cause of the obstruction and to employ reasonable methods, consistent with the rights of all involved, to remove the roadblock. When the court undertakes that inquiry and concludes that the impediment is the joint representation of the

uncooperative witness and of other persons who may be implicated by that witness's testimony, it must have discretion to resolve the problem by disqualifying counsel from representing clients whose interests appear to be adverse.

Moreover, a district court's power to order an end to multiple representation of grand jury witnesses is not grounded solely in its responsibility to eliminate improper obstacles to the grand jury's work. Also involved is the court's obligation to control the conduct of its officers, here defense attorneys, in instances strongly suggesting a breach of or insensitivity to ethical obligations. See *Hull* v. *Celanese Corp.*, 513 F. 2d 568, 571 (2d Cir. 1975). Canon 5 of the American Bar Association's Code of Professional Responsibility cautions that "[a] lawyer should never represent in litigation multiple clients with differing interests" and that "there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests" (EC 5-15). When such a conflict appears from the record, the court must take appropriate action to remove it.

These difficulties cannot be solved simply by obtaining a waiver from the clients involved. While a defendant in a criminal case may, under some circumstances, waive his right to conflict-free counsel at trial (see, *e.g.*, *United States* v. *Gaines*, 529 F. 2d 1038, 1044 (7th Cir. 1976); *United States* v. *Armedo-Sarmiento*, 524 F. 2d 591, 593 (2d Cir. 1975); *United States* v. *Garcia*, 517 F. 2d 272, 275-278 (5th Cir. 1975)), the considerations are far different at the pre-indictment stage. For one thing, there is the strong public interest, mentioned above, in removing impediments to untrammeled grand jury investigations, including impediments caused by the joint representation of witnesses with adverse interests, that has

no parallel during a trial. A client obviously cannot waive the public's right to fair and complete criminal investigations.

Furthermore, "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judiciary proceedings have been initiated against him." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). Hence, unlike a criminal defendant, a witness before the grand jury has no constitutional right to counsel, much less to the counsel of his choice (see *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976); *In re Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir.), cert. denied, 350 U.S. 897 (1955)), and accordingly the court need not show the same deference to the client's wishes during grand jury proceedings that it would at trial, especially when other values would thereby be seriously jeopardized. In addition, the court can obtain no satisfactory assurance that the witness has indeed knowingly and intelligently waived objection to the conflict when the witness has made the decision based on the advice of the attorney with conflicting interests and without the assistance of independent counsel.

2. These considerations strongly indicate that a district court has discretion to disqualify counsel from representing multiple witnesses in a grand jury proceeding when the court reasonably believes that the joint representation involves a conflict of interest obstructing the work of the grand jury or raising ethical concerns. Applying this standard, the court did not abuse its discretion in disqualifying petitioners from representing Johns in the circumstances of this case. To begin with, the joint representation obviously was impeding the grand jury's inquiry. Despite the grant of immunity, Johns' testimony was abbreviated and evasive and was

interrupted by her leaving the grand jury room after virtually every question to tape record the questions and answers—with Kocan within earshot. Johns, as the bookkeeper and secretary of Majestic News, plainly was in a position to give critical testimony regarding her employer and fellow employees, yet the grand jury was unlikely to obtain her full cooperation so long as she was represented by attorneys who had been picked (and perhaps eventually compensated) by her employer and who also represented the prime target and other subjects of the investigation.

By the same token, there was "a direct and immediate conflict of interest in [petitioners'] representation of" both Johns and Kocan (Pet. App. 6a). As the district court noted, "[t]he conflict is certainly direct in that [petitioners] represent a person who is operating under a grant of statutory use immunity as well as people who are prospective defendants. The conflict is also immediate because Mrs. Johns has a formal offer of non-prosecution by the government. It requires but a statement of the obvious to realize that negotiations for a promise of non-prosecution cannot be conducted by attorneys who also represent those people who may well be hurt by testimony resulting from such a promise.[5] There can be no better example of the ancient axiom that '*no man can serve two masters*' " (Pet. App. 5a-6a; emphasis in original). Petitioners obviously could not give undivided loyalty to either client, since Johns' interest in testifying fully and truthfully, and thus avoiding any personal liability, may well have led her to implicate Kocan and could not be reconciled with Kocan's interest in nondisclosure.

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[5]Government counsel testified that the joint representation inhibited discussion with petitioners concerning Johns' role in the investigation (Tr. 87, 341-342). See *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652, 656 (4th Cir. 1977).

Petitioners also could not avoid being influenced in representing one client by confidential matters they learned by representing the other.[6] As this Court recently emphasized in a related contest, "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway* v. *Arkansas*, No. 76-5856 (Apr. 3, 1978), slip op. 15 (emphasis in original).

Finally, although Johns attempted to waive any conflict of interest, the court properly concluded that the waiver was ineffective. Not only can such waivers not be dispositive in the grand jury context, for the reasons mentioned above, but also the record in this case casts serious doubt on whether Johns' waiver was knowing and intelligent. Her waiver, the court found, was "likely *a function in large part of one's natural hesitancy to alienate their employer rather than a product of a free and unrestrained will*" (Pet. App. 7a; emphasis in original). Indeed, Johns' decision not to obtain different counsel undoubtedly was attributable in no small measure to petitioners' advice to her that no conflict of interest existed (Pet. App. 7a-8a). See *United States* v. *Garafola*, 428 F. Supp. 620, 624 (D. N.J. 1977).

In sum, as the Fifth Circuit has remarked in upholding the disqualification of an attorney from representing multiple witnesses in a grand jury investigation, "the public interest in a properly functioning judicial system must be allowed to prevail in the case presently before us. Appellant had placed

[6]Indeed, petitioner Janavitz testified that he discussed aspects of Johns' testimony before the grand jury with Kocan (Tr. 116-117).

himself in a clear conflict situation from which the district court had the duty to rescue both the lawyer and his clients." *In re Gopman*, 531 F. 2d 262, 268 (1976).

3. Contrary to petitioners' contention (Pet. 7-10), the decision below does not conflict with the holding of any other court of appeals. Six circuits have addressed the question whether a district court may disqualify an attorney from representing witnesses with adverse interests in a grand jury proceeding, and none has concluded that the court is powerless to order disqualification in those circumstances. See *In re Special February 1977 Grand Jury*, No. 78-1520 (7th Cir. Aug. 11, 1978); *In re Taylor*, 567 F. 2d 1183 (2d Cir. 1977); *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652 (4th Cir. 1977); *In re Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F. 2d 600 (D.C. Cir. 1976); *In re Gopman, supra.*

In two of these cases, the court of appeals upheld the district court's disqualification order. *In re Investigation Before February, 1977, Lynchburg Grand Jury, supra*; *In re Gopman, supra.* In the remaining cases, the court declined to require that an attorney representing multiple grand jury witnesses be disqualified, but only because the government's motion was premature (*In re Taylor, supra*, 567 F. 2d at 1187; *In re Grand Jury Empaneled January 21, 1975, supra*, 536 F. 2d at 1011, 1012-1013; *In re Investigation Before April 1975 Grand Jury, supra*, 531 F. 2d at 609) or because the record did not contain an adequate showing that the witnesses were truly adverse (*In re Special February 1977 Grand Jury, supra*, slip op. 5).[7] Indeed, it is significant that in each of the cases

[7]Although there is language in *In re Taylor, supra*, 567 F. 2d at 1191-1192, suggesting that the Second Circuit does not consider

holding that the disqualification attempt was premature, the court stressed the absence of any offer of immunity to the uncooperative witness.[8] Here, of course, Johns was given not only use immunity, but also a promise of non-prosecution, yet she persisted in her refusal to cooperate with the grand jury's inquiry for reasons that the district court found were the direct result of the joint representation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
FRANK J. MARINE
Attorneys

OCTOBER 1978

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disqualification to be an appropriate remedy in cases of a conflict of interest, these comments were not necessary to the court's decision and were not joined by other members of the panel. See *id.* at 1193 (Kaufman, C. J., concurring).

[8]See *In re Investigation Before April 1975 Grand Jury, supra,* 531 F. 2d at 605-609; *In re Grand Jury Empaneled January 21, 1975, supra,* 536 F. 2d at 1011; *In re Taylor, supra,* 567 F. 2d at 1187. See also *In re Special February 1977 Grand Jury, supra,* slip op. 5; *In re Grand Jury,* 446 F. Supp. 1132, 1136 (N.D. Tex. 1978).